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Opinion following rehearing

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re L.R., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. L.R., Defendant and Appellant.	A154437 (Contra Costa County Super. Ct. No. J18-00221)

Minor L.R. appeals following the juvenile court's disposition order, arguing the juvenile court erred in denying his motion to suppress and in the imposition of a commitment term. We remand for the juvenile court to set any review hearing necessary to the exercise of its supervisory authority over Minor, and otherwise affirm.

BACKGROUND

San Francisco County Offense

On December 3, 2017, in San Francisco County, a male took a woman's cellphone from her hand and passed it to Minor. Police saw the woman chasing Minor, apprehended him, and found the woman's phone in his pocket. Minor admitted to

misdemeanor receiving stolen property (Pen. Code, § 496, subd. (a)), and the case was transferred to Contra Costa County (Minor's county of residence) for disposition.

Alameda County Offense

On February 13, 2018, in Alameda County, Minor and another male robbed two victims, whom Minor later characterized as "little kids," using a weapon Minor described as a pellet "replica" gun. Minor was apprehended at the scene and confessed to the robbery. A search of Minor's cellphone revealed an email receipt for a "Semi-Auto BB Air Pistol." Minor admitted to attempted second degree robbery (Pen. Code, §§ 211, 664), and the case was transferred to Contra Costa County for disposition.

Contra Costa County Offense

In Contra Costa County on February 12, 2018—the day before the Alameda County robbery—two males robbed a victim at gunpoint, taking his cellphone. After Minor was arrested for the Alameda County robbery, he also confessed to the Contra Costa robbery. Minor had the Contra Costa County victim's cellphone in his possession at the time of his Alameda County arrest.

A Welfare and Institutions Code[1] section 602 juvenile wardship petition alleged appellant committed second degree robbery (Pen. Code, § 211), and further alleged Minor personally used a dangerous or deadly weapon, to wit, a BB gun (Pen. Code, § 12022, subd. (b)(1)). Minor filed a motion to suppress his statements to police, arguing they were elicited in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Following an evidentiary hearing on both the motion to suppress and jurisdiction, the juvenile court denied the motion to suppress and sustained the allegations of the petition.

Disposition

In May 2018, the juvenile court issued a dispositional order on the three petitions. The juvenile court adjudged Minor a ward, removed him from parental custody, and committed him to a county institution to participate in and complete the Youthful Offender Treatment Program (YOTP).

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[1] All undesignated section references are to the Welfare and Institutions Code.

DISCUSSION

I. *Motion to Suppress*

A. *Additional Background*

Minor's father testified Minor was 16 years old, had an individualized education program (IEP) at school, and had had an IEP since kindergarten.[2] Minor's school placed him in rooms with fewer students to help him learn. Sometimes Minor did not understand things his father told him or forgot them later on.

Officer Justin Kurland testified about his interview with Minor following Minor's Alameda County arrest. A videotape of the interview was admitted into evidence and reviewed by the juvenile court in chambers, along with a transcript provided by Minor. At the beginning of the interview, Officer Kurland read Minor the *Miranda* warnings from a printed card. After each warning, Officer Kurland asked Minor if he understood, and Minor nodded his head or answered affirmatively. Following the *Miranda* warnings, Officer Kurland asked, "So with those rights in mind, I want to talk to you and find out what's going on. Is that okay with you?" Minor nodded his head. After confessing to the Alameda and Contra Costa offenses, Officer Kurland asked Minor if he could "write down everything we talked about." Minor responded, "I don't know. Because I have a short-term memory. I forgot what we just talked about." Officer Kurland proceeded to ask Minor numerous questions about the robberies, which Minor answered, and Officer Kurland wrote a statement based on Minor's answers.

In a lengthy ruling from the bench, the juvenile court denied Minor's motion to suppress. The court reasoned that, having "watched the video very carefully[,] . . . I don't find that the officer very quickly or in a rushed way went through the *Miranda* advisements. He asked after each one: 'Do you understand?' And [Minor] either said 'yeah' or 'yes' or nodded." Moreover, Minor "appears to not have any difficulty communicating with the officer [or] understanding the questions," and "was not

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[2] "An IEP is a comprehensive statement of a disabled child's educational needs and the specifically designated instruction and related services that will meet those needs." (*In re I.V.* (2017) 11 Cal.App.5th 249, 253, fn. 4.)

unsophisticated," having "been arrested for a similar offense in San Francisco just two months before and had been in police custody . . . . So we know that this is not his first experience with law enforcement." With respect to Minor's IEP, "there are all kinds of reasons that kids can have IEPs. And without information about what that is, I don't have any reason to believe that the understanding that I saw on the videotape with respect to every question asked is somehow undercut by the fact that he has had some special education services." As for Minor's refusal to write down his statement, "[i]t was more a limitation of his willingness to cooperate than a genuine explanation that he was unable to recall. . . . He recalled everything that happened the day before. I don't believe that it was a genuine statement that he had short-term memory problems. He was making an excuse." The court concluded, "in the totality of the circumstances, the People have carried their burden that this was a knowing and voluntary waiver."

B. *Analysis*

"The prosecution has the burden of establishing, by a preponderance of the evidence, the voluntariness of an accused person's waiver of his *Miranda* rights. [Citation.] The waiver of *Miranda* rights must be voluntary in the sense that it was the product of a free and deliberate choice, and was made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. [Citation.] . . . [¶] To determine whether a juvenile's waiver of his *Miranda* rights is voluntary, a court should consider the totality of the circumstances, including the minor's 'age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.' [Citation.] When a confession by a minor is involved and 'counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary . . . .' [Citation.] On review, the appellate court defers to the trial court's factual findings if they are supported by substantial evidence but reviews de novo the ultimate question of whether a waiver was voluntary." (*In re T.F.* (2017) 16 Cal.App.5th 202, 210–211.)

Minor points to Officer Kurland's preface, before reading Minor his rights, that "I'm going to read you your rights, *real quick*; okay?" (Italics added.) Minor contends the officer thus "minimized the importance of these rights," citing *In re T.F., supra,* 16 Cal.App.5th 202. In *In re T.F.,* the Court of Appeal noted the officer "rapidly rattled off the *Miranda* admonition without taking time to determine whether T.F. understood all of his rights." (*Id.* at p. 211.) However, this was not the focus of the Court of Appeal's concern. Instead, the court concluded events before and after the admonitions demonstrated the minor was "cajoled or tricked": "[Officer] Hewitt informed T.F. of his *Miranda* rights after the youth had already undergone a nearly hour-long interrogation by two police detectives while confined in a school conference room, which culminated in his arrest. T.F. was sobbing and clearly distraught at school and remained so during the subsequent interrogation. Then, once at the station, before giving the *Miranda* warning, Hewitt told T.F., 'I'm gonna read these to you *before we talk, okay*?' (Italics added.) By this statement, Hewitt stated as a fact that T.F. would talk to him. This statement followed by the immediate recitation of rights, which included the right to remain silent, was contradictory and confusing. [¶] Then, after telling T.F. they were going to 'talk' and quickly dispensing the *Miranda* warning, Hewitt immediately launched into questioning T.F. about an unrelated outstanding warrant. From listening to the recorded interview, it is clear that T.F. was confused about the warrant. Hewitt asked T.F. several questions about the warrant before telling T.F., 'let's forget about the warrant for right now . . . That doesn't really have anything to do with this case. I was just curious if you remembered.' After befuddling T.F. by mixing up the *Miranda* rights with the warrant, Hewitt smoothly transitioned to questioning T.F., referring him 'back to what we were talking about up at the school.' " (*Id.* at pp. 211–212.) No comparable events took place in the case before us, and *In re T.F.* is thus readily distinguishable. Moreover, despite Officer Kurland's prefatory remark, the juvenile court explicitly found the officer's actual reading of the advisements was *not* done "very quickly or in a rushed way," and Minor does not challenge this finding.

Minor's additional arguments are unavailing. Minor notes that, although the printed *Miranda* card used by Officer Kurland included places to indicate whether the suspect understood each right and wanted to speak to the officer, these were all left blank on Minor's card. Minor cites no authority that written responses to *Miranda* warnings are required to find a voluntary and knowing waiver.[3] Similarly, Minor argues Officer Kurland did not explicitly ask, " 'Do you waive these rights?' " But Minor cites no authority that Officer Kurland's phrasing—"So with those rights in mind, I want to talk to you and find out what's going on. Is that okay with you?"—is insufficient. (See *People v. Gonzales* (2012) 54 Cal.4th 1234, 1269 [" '[n]o particular manner or form of *Miranda* waiver is required' "].) Finally, Minor contends Officer Kurland only orally advised him without showing him the written form, highlights his comment about "short-term memory," and points to his IEP. The trial court found Minor did not have difficulty understanding the officer's oral statements and questions, rejected the "short-term memory" statement as "an excuse," and found Minor's IEP alone—absent evidence about the disability giving rise to the IEP—did not undermine other evidence that Minor understood the admonitions. Substantial evidence supports these findings.

We conclude the juvenile court did not err in denying Minor's suppression motion.

II. *Commitment Term*

A. *Background*

At the disposition hearing, the juvenile court expressed concern about the "serious, dangerous series of incidents . . . , the use of a weapon, even if it is a BB gun, the increasing severity and victimization of people, including young kids, and having absolutely no empathy apparently or sense that he would not do it again.[4] I think that

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[3] That the *Miranda* card for Minor's co-responsible was filled out and the co-responsible did not make a statement, as Minor emphasizes, does not compel a finding that Minor's waiver was invalid.

[4] Minor told Officer Kurland he did not feel bad about the robberies, did not see anything wrong with them, and did not know whether he would commit more robberies in the future.

the intensive programming that's available to him here at YOTP is the most appropriate." The court committed Minor to a county institution for a period not to exceed the maximum custody time of seven years (less custody credits) or until he turns 21, whichever comes first, and to participate in and "successfully complete all phases of" YOTP. The court's comments and orders clearly contemplate that Minor will be released early if he successfully completes YOTP, and the parties so assume.

Minor's counsel objected "to the YOTP order with the unlimited [term]," arguing it violated "due process to order someone into a long-term program and not specifying how many days for the record." The juvenile court overruled the objection: "The YOTP program has specific modules. It has specific phases that have to be completed and classes that have to be taken. I understand the objection, but I don't think that it rises to the level of a due process issue."

B. *Analysis*

Minor argues the juvenile court "impermissibly [d]elegated its authority to the probation department to determine the length of the commitment," violating constitutional separation of powers and due process provisions.

We recently rejected the same argument in *People v. J.C.* (Mar. 28, 2019, A154389) __ Cal.App.5th __ (*J.C.*), another case involving a minor committed to juvenile hall for a maximum term with the possibility of early release if and when he successfully completed YOTP. In *J.C.,* we concluded the juvenile court did not delegate to the probation officer the authority to determine the length of the minor's commitment, and we declined to decide whether such a delegation would be an unconstitutional separation of powers violation. (*Id.* at __ [p. 3].) The reasoning in *J.C.* is sound and applies here.

In *J.C.,* we began by relying on *In re Robert M.* (2013) 215 Cal.App.4th 1178 (*Robert M.*), which held " 'the juvenile court retains supervision and control over a minor' " committed to juvenile hall and ordered to participate in a custodial treatment program, even though the minor " 'is answerable on a daily basis to those who operate the program.' " (*J.C., supra,* __ Cal.App.5th __ [p. 4] [quoting *Robert M.,* at p. 1185].)

We quoted *Robert M.'s* conclusion that, where the juvenile court " 'ordered that minor "successful[ly] complet[e]" ' the custodial treatment program, '[t]he court clearly has the retained jurisdiction to determine whether minor has done so.' " (*J.C.,* at __ [p. 4] [quoting *Robert M.*, at p. 1185].) *J.C.* held: "Under *Robert M.,* the juvenile court's commitment order did not delegate to the probation officer the determination of whether and when Minor successfully completes YOTP." (*J.C.,* at __ [p. 4]; see also *id.* at __ [pp. 4–5] [rejecting contention that *Robert M.* was inapposite because it addressed a different argument].)

Minor contends a YOTP "handbook" demonstrates that the probation officer determines the length of Minor's commitment, and requests we take judicial notice of the handbook. The People argue the handbook's descriptions of YOTP are not judicially noticeable as "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" (Evid. Code, § 452, subd. (h)). We need not decide whether the handbook is judicially noticeable because, even assuming it is, it supports our analysis rejecting Minor's challenge. As we explained in *J.C.*, where the minor requested judicial notice of the same handbook: "Minor points to the handbook's statement: 'Your commitment, as ordered by the court is for the maximum custody time allowed based on your charges or a period not to exceed your 21st birthday, whichever comes first. A court review will be set by your Deputy Probation Officer prior to your successful completion of phase three, your DPO [Deputy Probation Officer] will then inform the court of your progress, and whether you *should* be released . . . .' (Italics added.) This description plainly contemplates the probation officer will provide the juvenile court with an opinion about whether the minor has successfully completed the program and will make a recommendation to the court regarding the minor's release. The court will then make the final determination on these issues." (*J.C., supra,* __ Cal.App.5th __ [p. 6], fn. omitted.)[5]

[5] The People request we take judicial notice of a description of YOTP posted on the website of the California Probation Officers' Association, which states: "Once a youth achieves his last phase and *the court determines a release date*, based upon his

Although the juvenile court in *J.C.* set a "YOTP review hearing" at disposition, and the juvenile court here did not, it appears the juvenile court has or will schedule one at a later date. Notably, as discussed above, the parties each requested we take judicial notice of a description of YOTP, and each description clearly states further court review is part of the program. Both parties in effect agree that a further court review will be held, and we may therefore accept this as a mutual concession. (See *Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170, 175, fn. 3 ["where the parties agree, we accept their agreed facts as mutual concessions"].) Nonetheless, in an abundance of caution, we will remand for the juvenile court to set any review hearing necessary to exercise its supervisory authority.[6]

Minor argues that he "might not be able to pass the phases of the program that would bring him to its final phase," perhaps because of the disability giving rise to his IEP. Minor can of course raise any such issues at a review hearing. Moreover, as we noted in *J.C.*, "if Minor contends the probation officer is unfairly assessing Minor's performance in YOTP, this would appear to constitute a changed circumstance from the

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performance in the program, the resident, staff and his family, begin to work on his transition plan to the community." (Italics added.) Minor did not timely oppose the request—or oppose it at all until his petition for rehearing—and has arguably forfeited his belated opposition. (See *Giles v. Horn* (2002) 100 Cal.App.4th 206, 219, 228 ["Plaintiffs attack defendants' request for judicial notice on the basis that the fact of which judicial notice is requested 'is subject to dispute and not capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.' However, plaintiffs have waived any such challenge by failing to oppose defendants' request for judicial notice."]; see also Cal. Rules of Court, rule 8.54(c) ["A failure to oppose a motion may be deemed a consent to the granting of the motion."].) Nonetheless, we will deny the request because the People failed to demonstrate the descriptions of YOTP on the website of the California Probation Officers' Association—which does not administer YOTP—are judicially noticeable as "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).)

[6] We note that nearly one year has passed since the disposition order issued and we are unaware of Minor's current status. For example, he may have already been released from juvenile hall.

implicit assumption in the dispositional order that the probation officer will fairly assess Minor's performance" and Minor can file a section 778 petition requesting the juvenile court modify the disposition order. (*J.C., supra,* __ Cal.App.5th __ [p. 7].) Similarly, if Minor believes a disability prevents his successful completion of the program, this would appear to constitute a changed circumstance from the implicit assumption in the dispositional order that Minor is capable of successfully completing YOTP. (See *In re I.V., supra,* 11 Cal.App.5th at p. 259 [rejecting argument that the juvenile court failed to sufficiently consider the special education needs of the minor when ordering him to complete a treatment program, and noting the minor "remained free to revisit the [treatment program] condition through an appropriate petition for modification. (§ 778.)"].)[7] Minor challenges the availability of this procedure because Minor, "while being in a locked facility, would not likely have the knowledge that his sentence is being unduly prolonged . . . ." Minor will be well aware if his peers are progressing through the phases at a substantially faster rate than he is.

Our conclusion in *J.C.* applies equally here: "In sum, the disposition order commits Minor to juvenile hall until age 21, but provides he will be released earlier if he successfully completes YOTP. Under the statutory scheme, the juvenile court retains the supervisory authority to determine whether and when Minor successfully completes YOTP and, therefore, whether and when he will be released early from juvenile hall. The juvenile court [has or will] schedule[] a[ny necessary] review hearing in the exercise of that supervisory authority. If Minor believes his ability to progress through the program is unreasonably impeded by the probation officer, he can bring the issue to the juvenile court at . . . [a] review hearing or by filing a section 778 petition. The commitment order

[7] Minor contends *In re I.V.* is inapposite because in that case, "[t]he juvenile court specifically stated that I.V. could present new information to the probation department to challenge the [treatment program] condition and that if the probation department suggested a need to do so, the court would be willing to set a special hearing to reevaluate the condition." (*In re I.V., supra,* 11 Cal.App.5th at p. 259.) The ability to file a section 778 petition does not depend on the juvenile court stating in advance that such a petition can be filed.

does not delegate to the probation officer the discretion to determine the length of Minor's commitment." (*J.C., supra,* __ Cal.App.5th __ [p. 8].)

DISPOSITION

The matter is remanded with direction to the juvenile court to set any review hearing necessary to the exercise of its supervisory authority. In all other respects, the judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

(A154437)